

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Dallas Fort Worth International Airport Board)	WT Docket No. 02-55
and Sprint Nextel Corporation)	
)	
Mediation No. TAM-50046)	

MEMORANDUM OPINION AND ORDER

Adopted: February 7, 2011**Released: February 7, 2011**

By the Deputy Chief, Policy Division, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we address a case referred to us for *de novo* review from Wave 2, Stage 2 mediation by the 800 MHz Transition Administrator (TA). At issue is whether the Dallas Fort Worth International Airport Board (DFW) is entitled to reimbursement from Sprint Nextel Corporation (Sprint) for costs associated with various services from its counsel, Shulman Rogers Gandal Pordy & Ecker (SRGPE) and engineering consultant, Trott Communications, Inc. (Trott). Based on our review of the mediation record, the TA-appointed mediator's (TA Mediator or Mediator) Recommended Resolution (RR),¹ and the parties' position statements, we approve a portion of DFW's attorney and engineering consultant costs.

II. BACKGROUND

2. DFW operates an 800 MHz system, call sign WNW1404, consisting of two fixed sites and 1,566 subscriber units.² The *800 MHz Report and Order* and subsequent orders in this docket require Sprint to negotiate a frequency relocation agreement (FRA) with each 800 MHz licensee subject to rebanding.³ Some licensees, including DFW, enter into a Planning Funding Agreement (PFA) with Sprint to develop a cost estimate and other details of rebanding their systems. Sprint and DFW executed a PFA on March 14, 2007.⁴ The terms of the PFA require DFW to document how it spent the planning funds that Sprint provided, through a process known as actual cost reconciliation (ACR). During the ACR process, DFW submitted two change notice requests seeking reimbursement for services not covered in the PFA. The first change notice request, submitted on June 30, 2008, specified costs incurred by DFW's

¹ Recommended Resolution (filed June 1, 2009).

² RR at 13.

³ Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, *Report and Order*, Fifth *Report and Order*, Fourth *Memorandum Opinion and Order*, and *Order*, 19 FCC Rcd 14969, 15021-45, 15069 ¶¶ 88-141, 189 (2004) (*800 MHz Report and Order*); *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd 25120 (2004) (*Supplemental Order*); *Memorandum Opinion and Order*, 20 FCC Rcd 16015 (2005); *Second Memorandum Opinion and Order*, 22 FCC Rcd 10467 (2007); *Third Memorandum Opinion and Order*, 22 FCC Rcd 17209 (2007).

⁴ Proposed Resolution Memorandum of Dallas Fort Worth International Airport Board, (filed April 29, 2009) (DFW PRM) at Exhibit 1. The PFA estimated planning costs totaled \$180,035. DFW PRM at 1.

outside counsel (SRGPE Change Notice).⁵ The second change notice request, submitted on January 21, 2009, specified costs incurred by Trott before and after the execution of the PFA (Trott Change Notice).⁶ The parties could not agree on the validity or scope of the two change orders, and in accordance with Section 90.677(d)(2) of the Commission's Rules,⁷ the dispute was referred to the TA who was unable to resolve the dispute through mediation.⁸ The TA Mediator accordingly submitted the RR and the mediation record to the Public Safety and Homeland Security Bureau for *de novo* review on June 1, 2009.⁹ DFW and Sprint filed Statements of Position on June 15, 2009.¹⁰

III. DISCUSSION

A. Standard of Review

3. The Commission's orders in this docket assign DFW the burden of proving that the funding it has requested is reasonable, prudent, and the "minimum necessary to provide facilities comparable to those presently in use" (Minimum Cost Standard).¹¹ The Commission has clarified that the term "minimum necessary cost" does not mean the absolute lowest cost under any circumstances, but the "minimum cost necessary to accomplish rebanding in a reasonable, prudent, and timely manner."¹² The Minimum Cost Standard thus takes into account not only cost, but all of the objectives of the proceeding, including completing the rebanding process in a timely and efficient manner, minimizing the burden that rebanding imposes on public safety licensees, and facilitating a seamless transition that preserves public safety's ability to operate during the transition.¹³

4. The Commission implemented the change notice process to provide licensees a mechanism for recovering legitimately incurred costs when they are faced with unanticipated changes in cost, scope, or schedule which occur during implementation or, in the case of an emergency.¹⁴ However, the Commission did not intend that licensees would use the change notice process either as a means of renegotiating agreements after the fact on issues that were raised or should have been raised during

⁵ RR at 4.

⁶ RR at 11. *See also* DFW PRM at Exhibit 2. There is a discrepancy between the costs requested in the Trott change notice and the costs that were addressed in mediation. This appears to be a result of negotiations and documentation exchanged between the Parties after the submission of the Change Orders but prior to the commencement of mediation. Both the RR and this *Memorandum Opinion and Order* use the costs submitted at mediation.

⁷ 47 C.F.R. § 90.677(d)(2).

⁸ RR at 3. *See also* 47 C.F.R. § 90.677(d)(2).

⁹ *Id.*

¹⁰ Statement of Position of Nextel Communications, Inc. (filed June 15, 2009) (Sprint SOP), Statement of Position of Dallas Fort Worth International Airport Board (filed June 16, 2009) (DFW SOP).

¹¹ *800 MHz Report and Order*, 19 FCC Rcd at 15074 ¶ 198; *800 MHz Supplemental Order*, 19 FCC Rcd at 25152 ¶ 71 (2004).

¹² *Improving Public Safety Communications in the 800 MHz Band*, WT Docket 02-55, *Memorandum Opinion and Order*, 22 FCC Rcd 9818, 9820 ¶ 6 (2007) (*Rebanding Cost Clarification Order*).

¹³ *Id.* at 9820 ¶¶ 6, 8.

¹⁴ FCC Announces Supplemental Procedures and Provides Guidance for Completion of 800 MHz Rebanding, *Public Notice (Guidance PN)*, 22 FCC Rcd 17227(2007).

negotiations,¹⁵ or to allow recovery of unconsidered costs that were reasonably foreseeable during negotiations.¹⁶

5. The parties here urge different standards for evaluating the validity of the two change notice requests. DFW contends that the Commission's policies dictate an holistic approach, *i.e.*, that we should analyze a task, and the associated cost, in light of the overall objectives of the Licensee's rebanding project,¹⁷ and focus on "whether the time expended and cost incurred (in the absence of bad faith) were reasonable, prudent and necessary to keep the licensee's rebanding on task,"¹⁸ without regard to the amount of the change notice request or when it was submitted.¹⁹ Sprint, however, argues that DFW was bound by the PFA, *i.e.*, that "the PFA itself represents a settlement between the parties of all potentially disputed issues, whether they were specifically raised or not."²⁰ Sprint insists that the governing standard is whether the costs claimed in the change notice request were reasonably foreseeable during negotiations, even if DFW did not claim the costs at the time.²¹

6. We, however, analyze change notice requests against the overall goals of rebanding²² and do not apply a single, dispositive test to determine eligibility for reimbursement of costs sought in a change notice request. Instead, we apply a multivariate analysis in which the weight of each element corresponds to the facts present in individual cases. Thus, we reject Sprint's absolutist position that, if a task is foreseeable, the associated cost must be disallowed. We also reject, however, DFW's contention that foreseeability should be disregarded in our analysis. The Commission has specifically mandated that we take foreseeability into account in our analysis of disputed change notice requests: "[l]icensees may not use the change notice process to recover costs that were reasonably foreseeable during planning or FRA negotiations but were not raised in negotiations, or that were considered and rejected."²³ The Commission also has explained that "it is not reasonable for licensees to use the change notice process to attempt to re-negotiate their agreements after the fact based on issues that should have been or actually were raised earlier."²⁴ Thus, although the question of whether a cost was "reasonably foreseeable" is an important, and, in some instances, paramount, consideration in our analysis of change notice requests, we also take into account whether approval of the request would advance the overall goals of rebanding and whether there are any mitigating factors present that support grant of the request.

¹⁵ Improving Public Safety Communications in the 800 MHz Band, *Fourth Memorandum Opinion and Order*, 23 FCC Rcd 18512 ¶ 31 (*Fourth MO&O*) (2008).

¹⁶ See *Guidance PN*, 22 FCC Rcd at 17229.

¹⁷ Reply to Nextel Proposed Resolution Memorandum (filed May 12, 2009) (DFW Reply) at 2.

¹⁸ *Id.*

¹⁹ DFW PRM at 8. DFW also maintains that the TA can not apply standards established in the *Guidance PN* to the PFA, because the Public Notice was released six months after the disputed cost were accrued and the PFA was executed. DFW SOP at 2-3.

²⁰ Proposed Resolution Memorandum of Nextel Communications, Inc. (filed May 6, 2009) at 5 (Sprint PRM).

²¹ *Id.*

²² The change notice assessment procedure is similar to assessment under the Minimum Cost Standard. *Rebanding Cost Clarification Order*, 22 FCC Rcd at 9819 ¶ 8. (The Commission clarified that the overall goals of rebanding take precedence over the single issue of minimum cost.)

²³ *Guidance PN*, 22 FCC Rcd at 17230.

²⁴ *Fourth Memorandum Opinion and Order*, 23 FCC Rcd at 18521 ¶ 31.

B. Issues in Dispute**1. SRGPE Change Notice**

7. On June 30, 2008, DFW submitted a change notice request to Sprint seeking reimbursement of an additional \$9,579.87 in legal fees.²⁵ Sprint asserts that the fees are unwarranted.²⁶

8. *DFW Position.* DFW contends that “the rebanding project is not a ‘gotcha’ whereby a licensee or vendor who makes an error cannot make a correction (other than a situation where bad faith is involved)”²⁷ and that, absent bad faith, the proper inquiry for change notice requests is “whether the task is appropriate, and whether the hours requested for the task are appropriate.”²⁸ DFW states that the additional legal fees it incurred were attributable to “additional planning time, both for DFW and generically for all Shulman Rogers rebanding clients.”²⁹ DFW’s counsel explains that, because he was out of town when the PFA costs were agreed to, his absence resulted in the “updating [of his fees being] inadvertently not completed upon [his] return.”³⁰ DFW claims that Sprint was aware of the additional legal fees sought in the change notice request because the parties had discussed the matter of legal fees earlier.³¹ Specifically, DFW asserts that, at the outset of negotiations, Sprint requested DFW to decrease its claimed legal fees because the parties anticipated that a PFA would be reached quickly, without the need for extensive legal services.³² DFW acceded to Sprint’s requested reduction in legal fees. DFW, however, claims that the negotiations took far longer than anticipated, with a consequent increase in negotiation-related legal fees.³³

9. *Sprint Position.* Sprint asserts that the Commission’s foreseeability standard is objective and is therefore unaffected by the subjective question of whether DFW actually foresaw the need to include the additional legal fees in the PFA.³⁴ It emphasizes that the additional legal services for which DFW now claims reimbursement were performed before the PFA was executed, and therefore were “obviously foreseeable during PFA negotiations.”³⁵ The change notice request, Sprint argues, is tantamount to an attempt to re-negotiate the PFA on an issue that was raised in negotiations.³⁶

10. *Mediator’s Recommendation.* The TA Mediator recommends that the Commission find that DFW is not entitled to the additional \$9,579.87 for SRGPE’s legal services.³⁷ The Mediator agrees

²⁵ RR at 8.

²⁶ *Id.* at 4. The TA notes that Sprint offered to approve a change notice for \$234 to cover bi-weekly reports that may not have been reasonably foreseeable when the PFA was signed, but that the offer is absent from Sprint’s PRM. *Id.* at 10. The amount at issue is *de minimis* relative to DFW’s total rebanding cost and we do not treat it further.

²⁷ DFW PRM at 14.

²⁸ *Id.* at 15.

²⁹ *Id.* at 3.

³⁰ *Id.* at 14.

³¹ DFW PRM at 14.

³² *Id.*

³³ *Id.* See also DFW SOP at 2.

³⁴ RR at 9.

³⁵ Sprint SOP at i.

³⁶ Sprint PRM at 6.

³⁷ RR at 10.

with Sprint that the entire amount was reasonably foreseeable during the PFA negotiations and that the Licensee appears to be seeking to re-negotiate the PFA after its execution.³⁸

11. *Decision.* We agree with the Mediator and find DFW is not entitled to reimbursement for the legal fees it incurred prior to the execution of the PFA but which were not included therein. Pursuant to the Commission's Orders and TA policy, a licensee must present a complete cost estimate to Sprint and diligently review the costs in the PFA before execution.³⁹ We recognize that, even with exercise of diligence, parties will make mistakes. Indeed, in the discussion of Trott's fees, *infra*, we approve an expenditure not included in the DFW PFA because of mistake. Here, however, we are not persuaded that the failure to include the additional legal fees associated with PFA negotiations was a mistake. We find it significant that legal fees associated with the PFA were the subject of negotiation between the parties, and that DFW agreed to a fee reduction. The change notice request, therefore, appears to be no more than an attempt by DFW to recoup the legal fees that it agreed to forego when it negotiated the PFA. Finally, we find the amorphous claim that the fees were incurred "both for DFW and generically for all Shulman Rogers rebanding clients" to be unpersuasive. Sprint, in this proceeding, is not obligated to pay for SRGPE's legal work on behalf of other "generic" clients of the firm. We therefore disallow the additional \$9,579.87 claimed for SRGPE's legal services.

1. Trott Change Notice Request

12. The parties dispute an aggregate of \$54,755 in costs accrued by Trott: \$25,180 for Pre-Planning, \$13,475 for Internal Cost Estimate Development and \$16,100 for FRA Negotiation hours.⁴⁰ Sprint disputes all of these costs but does not refute DFW's reasons for why they were incurred.⁴¹ We address these three cost categories *infra*.

a. Pre-Planning Hours

13. *DFW Position.* DFW seeks 144 hours (\$25,180), for Trott's services performed before the PFA was completed. It acknowledges that it should have raised the matter of these fees during the PFA negotiations and that they should have been included in the PFA.⁴² DFW breaks down the 144 hours as follows:

- 99 hours were devoted to preparation of the Request for Planning Funding (RFPF) and were expended between August 2005 and July 2006 at a cost of \$17,305.
- 45 hours were devoted to negotiation of the terms and conditions of the PFA and were expended between August 2006 and January 2007 at a cost of \$7,305.⁴³

14. DFW asserts that the cost of Trott's services, *supra*, was not included in the PFA because of a billing error. Specifically, DFW claims that it had a retainer agreement with Trott and paid Trott directly, pursuant to that retainer agreement, for the 144 hours of services that Trott performed before the

³⁸ *Id.*

³⁹ 800 MHz Report and Order, 19 FCC Rcd at 15075 ¶ 201.

⁴⁰ RR at 22.

⁴¹ Sprint PRM at 19.

⁴² RR at 11. DFW submitted a Request For Planning Funding (RFPF) on June 30, 2006 and revised it on August 4, 2006.

⁴³ *Id.*

PFA was completed.⁴⁴ At that time, there was no mechanism by which DFW could have billed Sprint for Trott's services. DFW asserts that Trott discovered, during the ACR process, that its fees had not been included, *i.e.*, that they had mistakenly been billed to the retainer account and paid by DFW. Trott notified DFW which timely submitted a change notice request seeking \$ 25,180 for Trott's pre-planning and PFA negotiation services.⁴⁵ DFW, however, was able to provide documentation for only the 99 hours of Trott's services associated with preparation of the RFPF.⁴⁶ It neither provided documentation of the additional 45 hours, at a fee of \$ 7,305, which Trott allegedly devoted to negotiating the PFA, nor explained why it failed to do so. Instead, DFW argues that—the lack of documentation, notwithstanding—Sprint should compensate DFW for the 45 hours of Trott's PFA negotiation services based on “general principles of equity.”⁴⁷

15. *Sprint Position.* Sprint contends that Trott's costs, *supra*, are not reimbursable because they were incurred prior to the execution of the PFA and, therefore, were reasonably foreseeable and should have been included in the PFA.⁴⁸ In response to DFW's claim that the exclusion of these costs from the PFA arose from a billing error, Sprint contends that “DFW certainly had every opportunity [when reviewing the PFA] to question whether the Trott costs were properly reflected in the schedules and request adjustments in the event that [the schedules] failed to reflect DFW's understanding of those costs.”⁴⁹

16. *Mediator Recommendation.* The Mediator concludes that DFW has failed to demonstrate that Trott's costs could not have reasonably been foreseen.⁵⁰ Accordingly, the Mediator recommends that DFW not be reimbursed for any of the 144 hours claimed for Trott's pre-planning and PFA negotiation services.⁵¹

17. The TA Mediator, however, finds that the billing error that led to 99 hours of Trott's services not being included in the PFA was a good faith, credible and inadvertent omission on DFW's part, but was, nonetheless, foreseeable, therefore barring recovery of the claimed amount.⁵² The TA mediator declines to approve the remaining 45 hours of Trott's services on equitable grounds, as DFW requested, because “the TA Mediator lacks the authority to create an equitable exception to the general policy established by the Commission.”⁵³ The TA Mediator recognizes that this outcome “may seem harsh,” but is justified by the need for finality in the PFA negotiation process and by the responsibility that the Commission has placed on licensees for accuracy and completeness in their cost estimates.⁵⁴

⁴⁴ *Id.* See also DFW PRM at 9. During this period there was no vehicle for Trott to bill Sprint directly. As a result Trott, a DFW vendor prior to the rebanding process, billed DFW directly for all costs accrued between September 2005 and August 2006.

⁴⁵ RR at 11.

⁴⁶ See DFW PRM at Exhibit 10.

⁴⁷ RR at 12.

⁴⁸ *Id.*

⁴⁹ Sprint PRM at 12.

⁵⁰ RR at 13.

⁵¹ *Id.* at 13-14.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 14.

18. *Decision.* We do not wholly agree with the TA Mediator’s analysis. DFW has satisfactorily explained that it paid Trott directly from the retainer account—based on their prior working relationship—and that it neglected to include Trott’s services for RFPF preparation when it negotiated the PFA. It has adequately documented that Trott did provide services in connection with the RFPF that were a necessary part of the rebanding process. The foreseeability criterion is not so rigid that we require a licensee to anticipate that its vendors will bill their services to the wrong account. No harm accrued to Sprint, which has not contested the need for the services or the fact that they were performed. Moreover, we see no evidence of DFW abusing the change notice process by “padding” its rebanding costs or attempting to renegotiate matters already considered in negotiation of the PFA. Based on the record before us, it is apparent that DFW made a mistake attributable, at worst, to inadvertence, and not so negligent as to bar recovery. It is entitled to reimbursement for \$ 17,305 for Trott’s services associated with RFPF preparation.

19. We do not reach the same conclusion relative to the 45 hours, at a fee of \$ 7,305, claimed for Trott’s PFA negotiation services. DFW concedes it cannot document that these services were provided and, instead, invokes equity as a reason we should require Sprint to pay this cost. We do not credit DFW’s argument that the lack of documentation for Trott’s alleged PFA negotiation services should be overlooked based on equitable principles. Equitable principles cut both ways—it would be inequitable for us to require Sprint to pay for services that DFW has failed to document and asks us to take on faith. It was certainly foreseeable to DFW that the Commission would disapprove payment of undocumented services. Its failure to provide documentation is fatal to its after-the-fact claim for reimbursement. Accordingly we disallow DFW’s claim of \$ 7,305 for 45 hours of Trott’s PFA negotiation services.

b. Internal Cost Estimate Development Hours

20. Initially, DFW was to develop its own estimate of its internal costs associated with rebanding its system,⁵⁵ and the PFA allocated 124 hours of DFW’s time, at a cost of \$ 9,300 for development of the estimates.⁵⁶ Subsequently, however, DFW determined that it lacked the internal resources to prepare the estimates by the January 15, 2008 deadline, and assigned the task to Trott which then billed 77 hours of time at a cost of \$ 14,475 to prepare the estimate of DFW’s internal rebanding-related costs.⁵⁷ Trott met the deadline, but DFW waited more than a year to file a change notice request seeking \$ 14,475 for Trott’s services.⁵⁸ Sprint submits it should not be required to pay the additional \$14,175.⁵⁹

21. *DFW Position.* DFW first claimed that reassigning the internal cost estimate task to Trott at a cost of \$ 14,475 was reasonable, prudent, and necessary because it allowed the project to proceed without further delays.⁶⁰ Subsequently, however, DFW receded from its claim for \$ 14,475 and offered to submit another change notice request that would pay Trott \$ 9,300 for preparing the cost estimate - the same amount that DFW would have received had it prepared the estimate itself.⁶¹ DFW contends that its failure to submit Trott’s fees to negotiation was an “unintentional, innocent mistake” for which Trott

⁵⁵ *Id.* DFW’s billing rate for development of an internal cost estimate is \$75 per hour.

⁵⁶ DFW PRM at 11.

⁵⁷ *Id.* Trott’s billing rate for development of an internal cost estimate is \$175 per hour.

⁵⁸ RR at 14.

⁵⁹ *Id.* at 15.

⁶⁰ RR at 14-15.

⁶¹ *Id.* The difference totals \$4,175.

should not be penalized,⁶² and that the need for Trott to prepare the internal cost estimate was “totally unanticipated,”⁶³ and, thus, unforeseeable.

22. *Sprint Position.* Sprint argues that the 77 hours, at a fee of \$ 14,475 for Trott’s preparation of an estimate of DFW’s internal costs is unreasonable. It also argues that the 124 hours, at a cost of \$ 9,300, that DFW allocated for itself to prepare the cost estimates is likewise unreasonably high. Sprint contends that DFW’s 124 hours were to cover overall project management and planning support - not just the preparation of the internal cost estimate.⁶⁴ Accordingly, Sprint argues that the change notice request seeks to allocate substantially more funding for just the internal cost estimate than originally was allocated for all internal PFA project management costs.⁶⁵

23. Sprint also disputes DFW’s claim that reassigning the task of preparing an internal cost estimate from DFW to Trott constituted a change in the scope of Trott’s work.⁶⁶ According to Sprint, the PFA already specified that Trott was to prepare the internal cost estimate. In support, Sprint quotes Section 6.2 of the PFA, which states that Trott’s scope of work included: “Prepare the Customer’s rebanding plan and cost estimate for [Sprint].”⁶⁷

24. Finally, Sprint claims that Trott’s estimate of DFW’s internal costs was not completed until after the PFA was signed. It therefore contends that, as required by the PFA, DFW should have timely notified Sprint that the costs were being incurred, and, not having done so: “DFW plainly failed to comply with the terms of its contract and knowingly took the risk that it would be responsible for the cost associated with the solution it unilaterally chose to pursue.”⁶⁸

25. *Mediator’s Recommendation.* The Mediator recommends that the Commission conclude that DFW is entitled to \$9,300—the amount DFW allocated for developing its internal cost estimate itself—for Trott’s services in developing the internal cost estimate. The Mediator’s recommendation is contingent on DFW submitting a change notice request that would decrease the overall project cost by \$9,300 to account for the fact that Trott, not DFW staff, prepared the internal cost estimate.⁶⁹

26. The Mediator finds that developing an estimate for licensees’ internal costs is a necessary part of the rebanding effort and, therefore, is a reimbursable expense.⁷⁰ The Mediator credits DFW’s representation that an unanticipated change in the scope of Trott’s work occurred when DFW was unable to prepare the internal cost estimate and retained Trott to do so.⁷¹ The Mediator, however, finds no reason to exonerate DFW from its failure to follow the change notice process, outlined in the TA’s *Reconfiguration Handbook*, other TA guidance, and Section 5 of the PFA.⁷² Therefore, the Mediator

⁶² *Id.*

⁶³ DFW Reply at 6.

⁶⁴ *Id.* at 15.

⁶⁵ Sprint PRM at 17.

⁶⁶ *Id.* at 15.

⁶⁷ Sprint PRM at 17.

⁶⁸ Sprint PRM at 19.

⁶⁹ RR at 16-18.

⁷⁰ *Id.* at 17.

⁷¹ *Id.*

⁷² “If either Party believes that a change to the planning activities contemplated by the Planning Cost Estimate is required (including changes by Planning Vendors), such Party will promptly notify the other Party in writing Such request shall be accompanied by reasonable documentation supporting the need for and scope of the change (continued....)

concludes that the Licensee's failure to submit a contemporaneous change notice request to Sprint and the TA when DFW retained Trott to prepare the internal cost estimate denied Sprint the opportunity to negotiate the cost of the change and denied the TA the opportunity to evaluate the change prior to the work being completed.⁷³ The Mediator thus recommends that we find that DFW is entitled only to the \$9,300 that the PFA initially allocated for DFW's preparation of an estimate of its internal costs.⁷⁴

27. *Decision.* DFW should have included Trott's additional \$ 14,475 fee for preparation of an estimate of DFW's internal rebanding costs as part of its negotiations with Sprint for a PFA. It has neither satisfactorily explained its failure to do so, nor demonstrated that Trott's additional services were reasonably necessary to the preparation of the cost estimate.⁷⁵ We therefore agree with Sprint that Trott's \$ 14,475 fee should be disallowed. We find, however, that, as the TA Mediator recommended, Sprint should compensate DFW for \$9,300 of Trott's fees for development of the internal cost estimate—the same amount that DFW initially allocated for preparation of the internal cost estimate by its own staff. Thereby, the reallocation of the \$9,300 from DFW to Trott is a mere accounting change that will not affect the overall project management costs agreed to by the Parties in the PFA.

c. FRA Negotiation Support Hours

28. DFW seeks reimbursement of Trott's fee of \$ 16,100 (92 hours) for FRA negotiation support performed by Trott between January 20, 2008, and April 20, 2008.⁷⁶ Sprint contends it is not responsible for paying this amount.⁷⁷

29. *DFW Position.* The Licensee makes three arguments in support of the \$ 16,100 claimed for FRA negotiation support by Trott:

1. Section 6.3 of the PFA provides for negotiation support but does not have a line item in the vendor table for negotiation support from any vendor or DFW.⁷⁸
2. There were "several contentious issues that surfaced during the negotiations that required additional, unanticipated efforts."⁷⁹ Sprint cannot challenge the hours attributed to negotiation support, DFW alleges, because Sprint "significantly contributed to the delay and duplicative efforts resulting from [Sprint] not having representatives capable of making decisions present at meetings."⁸⁰
3. It would be unrealistic and impractical to completely suspend DFW's rebanding project while change orders are processed.⁸¹

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and any proposed increase or decrease in the Planning Cost Estimate and in the time required to finish planning for there configuration of Incumbent's existing facilities." PFA, executed March 14, 2007.

⁷³ RR at 17.

⁷⁴ *Id.* at 18.

⁷⁵ *Id.* at 11.

⁷⁶ *Id.* at 18.

⁷⁷ *Id.* at 19.

⁷⁸ *Id.* at 18.

⁷⁹ DFW PRM at 13.

⁸⁰ DFW Reply at 7.

⁸¹ DFW PRM at 14.

DFW claims that neither the timing of the change notice, *i.e.*, the submission of the change notice request after the PFA was signed, nor the fact that it is seeking reimbursement of FRA activities in a change notice request for a PFA is material to the question of whether Sprint is responsible for Trott's fee.⁸² Instead, DFW contends that the only relevant issue is whether the hours expended were necessary and reasonable to perform and complete the tasks.⁸³

30. *Sprint Position.* Sprint argues that the hours for FRA negotiation support were foreseeable during the FRA negotiation because that was when they were accrued, and thus should have been included in the FRA.⁸⁴ It contends that the "reasons or excuses as to why the costs were not presented at the proper time is [sic] not particularly relevant"⁸⁵ because the Commission's orders establish that it is the timing of the change notice that is controlling when evaluating foreseeability.⁸⁶ Sprint also argues that "ample" funding existed in the PFA for any necessary negotiation support tasks, *i.e.*, that the PFA provided DFW \$72,730 for vendor project management costs which included negotiation support.⁸⁷

31. *Mediator's Recommendation.* The Mediator recommends that the Commission disallow the claimed \$16,100 for 92 hours of FRA negotiation support by Trott.⁸⁸ The TA Mediator agrees with Sprint that the hours in dispute were entirely foreseeable and should have been presented to Sprint during the FRA negotiation period.⁸⁹ Moreover, the Mediator concludes that "it would not have been impractical to total the accrued negotiation hours and make sure they were accounted for accurately in the FRA, which had yet to be executed."⁹⁰

32. *Decision.* We agree with the Mediator's assessment. The executed PFA contains a category labeled "Negotiations Support" for which Trott is allocated \$35,630.⁹¹ Furthermore, the executed FRA includes \$46,890⁹² for Trott's services under the category "FRA Negotiations." Thus, the costs for negotiation support were negotiated by the parties and memorialized in both the PFA and the FRA. DFW has presented no credible reason why the additional amount for negotiation support it now seeks in a PFA change notice request was not included in either the PFA or FRA.

33. We have stated before that "it is not reasonable for licensees to use the change notice process to attempt to re-negotiate their agreements after the fact based on issues that [were] actually raised earlier,"⁹³ and that the change notice process is intended to allow recovery only for "unanticipated

⁸² RR at 19.

⁸³ DFW PRM at 12.

⁸⁴ RR at 19.

⁸⁵ Sprint PRM at 13.

⁸⁶ RR at 19; Sprint PRM at 14. *See also Guidance PN*, 22 FCC Rcd at 17229.

⁸⁷ RR at 19.

⁸⁸ *Id.* at 20.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ PFA at 18.

⁹² \$46,890 is the aggregate of the costs in two categories: (1) "FRA Negotiations: Provide technical expertise and negotiations through the development and execution of the FRA" and (2) "During negotiations and FRA project startup Trott will support the technical aspects of the system configuration." Sprint PRM at 13.

⁹³ *Fourth Memorandum Opinion and Order*, 23 FCC Rcd at 18521, ¶31.

changes in cost, scope, or schedule that occur during implementation or in the case of emergency.”⁹⁴ DFW does not claim that its request meets any of these criteria for change notice requests. Instead, DFW relies on undocumented claims that Sprint delayed the negotiations, that there was no specific line item for negotiation support in the PFA, and that following the change notice process would have been impractical. The record, however, shows that, in both the PFA and the FRA, the costs negotiated between the Parties include negotiation support hours for Trott, even if they are not broken down by line item. We agree with the Mediator’s conclusion that the accrued negotiation support hours could have been accounted for before the FRA was executed. The additional negotiation support hours, moreover, do not meet the *Rebating Cost Clarification Order* criterion of being “an unanticipated change ... that occur[red] during implementation.”⁹⁵

34. Although we conclude that negotiation support was necessary, we find that the FRA provides a reasonable allocation for the task and that the costs accrued were foreseeable because they already had been incurred before the FRA was executed. We therefore reject DFW’s claim for additional negotiation support services.

2. Legal Fees for Preparation of the Change Notices and PRMs

35. DFW also seeks reimbursement for 25 hours of outside counsel fees, at an hourly rate not to exceed \$435 per hour (\$10,875) for legal services SPRGE provided in connection with both change notice requests.⁹⁶ Sprint submits that the legal fees are unwarranted.

36. *DFW Position.* The licensee states that SPRGE advised DFW on the change notice requests and prepared the requests and subsequent documents, and will continue to advise DFW on disputed change notice issues.⁹⁷

37. *Sprint Position.* Sprint contends that the legal services related to the change notice requests and subsequent documents should be disallowed because they are excessive, unreasonable, and would have been rejected as such had they been submitted during negotiations.⁹⁸ It contends that for both change notice requests there is no dispute over the facts or the governing legal standard.⁹⁹ Therefore, Sprint argues that both change notices and the associated mediation process “needlessly wasted resources” and urges the Commission to make clear that Sprint is not required to pay licensees for litigation-related costs where the facts and governing legal standard are “straightforward.”¹⁰⁰

38. *Mediator Recommendation.* The TA Mediator recommends that the Commission find that DFW is eligible for reimbursement not to exceed \$10,875 for SPRGE’s legal fees, subject to DFW providing appropriate documentation to Sprint.¹⁰¹ The Mediator reasons that DFW has met its burden of proof that the additional fees satisfy the Minimum Cost Standard—and therefore are reimbursable—because of (1) the lack of a challenge from Sprint on the reasonableness of the licensee’s legal fee estimates; (2) Sprint’s failure to cite legal authority for disallowing the fees; and (3) the necessity of the

⁹⁴ *Rebating Cost Clarification Order*, 22 FCC Rcd at 9820 ¶ 8.

⁹⁵ *Id.* (emphasis added).

⁹⁶ RR at 20.

⁹⁷ *Id.*

⁹⁸ Sprint PRM at 10.

⁹⁹ Sprint SOP at 13.

¹⁰⁰ *Id.* at 14.

¹⁰¹ RR at 21.

change notice process to the rebanding process as acknowledged in the *Guidance PN*¹⁰² and the TA's Reconfiguration Handbook.¹⁰³

39. *Decision.* We agree with the Mediator's recommendation, but for somewhat different reasons. First, the change order requests are neither frivolous on their face nor advanced in bad faith. Second, DFW has prevailed in one of its claims - the claim for reimbursement of Trott's "mis-billed" \$ 17,305 fee for preparing the RFPF. A licensee's entitlement to reimbursement of legal fees associated with change order requests does not hinge on whether the licensee prevails in its request. A licensee's prevailing, however, does suggest that the request was not frivolous or advanced in bad faith. Here, Sprint has not contended, and we cannot conclude, that the change notice requests were frivolous or advanced in bad faith and we therefore allow DFW's outside counsel fees connected with the change notice requests and subject to documentation.¹⁰⁴

IV. CONCLUSION

40. Our decision today follows the Commission's mandate that the 800 MHz reconfiguration change notice process should be available to allow licensees to recover costs due to unanticipated and unforeseeable changes in cost, scope, or schedule which occur during implementation or in the case of an emergency.¹⁰⁵ We find that DFW has met the criteria for change notice requests with respect to the following approved costs:

- \$17,305 for Trott's RFPF development;
- \$9,300 for Trott's services developing DFW's internal cost estimate; and
- 25 hours of outside legal counsel fees at an hourly rate not to exceed \$435 per hour (maximum of \$10,875) for SRGPE's services relating to the change notice process.

V. ORDERING CLAUSES

41. Accordingly, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 0.191, 0.392, and 90.677 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392, 90.677, IT IS ORDERED that the issues submitted by the Transition Administrator are resolved as discussed above.

¹⁰² *Guidance PN*, 22 FCC Rcd at 17229.

¹⁰³ Reconfiguration Handbook at 88-90. The Reconfiguration Handbook can be found at http://www.800ta.org/content/resources/Handbook_v3.pdf.

¹⁰⁴ The subject fees, as with all rebanding-related fees and expenses, are subject to itemization, review, and reconciliation by the TA when rebanding of DFW's system is complete.

¹⁰⁵ *Guidance PN*, 22 FCC Rcd at 17229.

42. IT IS FURTHER ORDERED that the Transition Administrator shall convene a meeting of the parties within seven business days of the date of this *Memorandum Opinion and Order* for the purpose of negotiating a Frequency Reconfiguration Agreement, or amendment thereto, consistent with the resolution of issues as set forth herein.

FEDERAL COMMUNICATIONS COMMISSION

Michael J. Wilhelm
Deputy Chief, Policy Division
Public Safety and Homeland Security Bureau